

IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-

76-749

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, OLIN CORPORATION and THE UPJOHN COMPANY,

Petitioners,

— against —

THE GOVERNMENT OF INDIA, THE IMPERIAL GOVERNMENT OF IRAN, THE
REPUBLIC OF THE PHILIPPINES and THE REPUBLIC OF VIETNAM,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

JULIAN O. VON KALINOWSKI
515 South Flower Street
Los Angeles, California 90071

JOE A. WALTERS
3800 IDS Tower
Minneapolis, Minnesota 55402

JOHN H. MORRISON
200 East Randolph Drive
Chicago, Illinois 60601

Attorneys for Petitioner Pfizer Inc.

MERRELL E. CLARK, JR.
40 Wall Street
New York, New York 10005

*Attorney for Petitioner
Bristol-Myers Company*

ROBERTS B. OWEN
888 Sixteenth Street, N.W.
Washington, D.C. 20006

*Attorney for Petitioner
The Upjohn Company*

December 1, 1976

SAMUEL W. MURPHY, JR.
WILLIAM J. T. BROWN
30 Rockefeller Plaza
New York, New York 10020

PETER DORSEY
2400 First National Bank Building
Minneapolis, Minnesota 55402

*Attorneys for Petitioner
American Cyanamid Company*

ALLEN F. MAULSBY
One Chase Manhattan Plaza
New York, New York 10005

*Attorney for Petitioners
Squibb Corporation and
Olin Corporation*

GORDON C. BUSDICKER
1300 Northwestern Bank Building
Minneapolis, Minnesota 55402

*Attorney for Petitioners
Bristol-Myers Company,
The Upjohn Company,
Squibb Corporation, and
Olin Corporation*

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**PETITION FOR A WRIT OF CERTIORARI TO
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Petitioners respectfully pray that a writ of certiorari
issue to review the judgment and opinion of the United
States Court of Appeals for the Eighth Circuit entered in
this proceeding on September 3, 1976.

Opinions Below

The *per curiam* opinion of the United States Court of
Appeals for the Eighth Circuit, sitting *en banc*, No. 76-1064
(8th Cir. Sept. 3, 1976), is not yet reported. The opinion
previously rendered by a panel of that circuit is unofficially
reported at 1976-1 Trade Cas. ¶ 60,892. Both are set forth in
the appendix (App. A-1 and B-1), together with concurring
and dissenting opinions. Also set forth in the appendix are

three unreported memoranda of the United States District Court for the District of Minnesota which concern, respectively, the cases of respondents the Philippines (App. C-1), India (App. D-1), and South Vietnam, the Philippines and Iran (App. E-1).

Jurisdiction

The judgment of a panel of the Court of Appeals for the Eighth Circuit was initially entered on May 19, 1976. A timely petition for rehearing *en banc* was granted on June 24, 1976, and, after such rehearing on August 17, 1976, the judgment of the Court of Appeals was entered on September 3, 1976. This petition for a writ of certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1970).

Question Presented

Are foreign countries "persons" entitled to sue for treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15 (1970)?

Statutory Provisions Involved

The Clayton Act, Act of Oct. 15, 1914, ch. 323, 38 Stat. 730, as amended:

Section 4. [Suits by persons injured; amount of recovery]

That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15.

Section 1. [Words defined]

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

15 U.S.C. § 12.

Statement of the Case

Respondents India, Iran, the Philippines and South Vietnam sued the petitioning drug companies for treble damages, alleging that the companies had violated sections 1 and 2 of the Sherman Act by conspiring to restrain and monopolize trade in tetracycline, a broad spectrum antibiotic patented in 1955.¹ The District Court's jurisdiction was invoked pursuant to section 4 of the Clayton Act, 15 U.S.C. § 15.²

1. The Court of Appeals has suggested that South Vietnam's case be either suspended or dismissed, in view of the fall of that government. *Pfizer Inc. v. Lord and The Republic of Vietnam*, 522 F.2d 612, 613 n.3 (8th Cir. 1975), *cert. denied*, 424 U.S. 950 (1976). The District Court has not yet acted upon petitioners' motion to dismiss made pursuant to that suggestion, and South Vietnam remains a respondent here, represented by the same counsel as respondent India. In addition to the cause of action described, India, but not the other respondents, has attempted to plead a claim under section 7 of the Clayton Act (15 U.S.C. § 18) and a common-law deceit action for single damages. India's right to pursue the latter claim is not challenged in this petition.

2. *Historical background*: These cases form a part of the extensive damage litigation waged against petitioners by scores of private parties, all fifty States of the Union, and the United States Government. For the early FTC proceeding, see *In re American Cyanamid Co.*, 63 F.T.C. 1747 (1963), *vacated and remanded sub nom. American Cyanamid Co. v. Federal Trade Commission*, 363 F.2d 757 (6th Cir. 1966), *In re American Cyanamid Co.*, 72 F.T.C. 623 (1967), *aff'd sub nom. Charles Pfizer & Co. v. Federal Trade Commission*, 401 F.2d 574 (6th Cir.), *cert. denied*, 394 U.S. 920 (1968). For the criminal antitrust case, see *United States v. Chas. Pfizer & Co.*, 426 F.2d 32 (conviction reversed), *rehearing en banc denied*, 437 F.2d

(fn. cont. on following page)

Petitioners moved to dismiss the claims of the respondent foreign countries on the ground that they are not among the "persons" on whom section 4 of the Clayton Act confers a cause of action for treble damages. The District Court for the District of Minnesota refused to dismiss, holding that India, Iran, the Philippines and South Vietnam *are* persons entitled to sue for treble damages.³ Thereafter, the District Court held that there was "substantial ground for difference of opinion" as to the correctness of its decision; that the decision concerned "a threshold issue which should be resolved before the parties become further involved in other pretrial proceedings and discovery" (App. D-2); and that resolution of the issue on interlocutory appeal pursuant to 28 U.S.C. § 1292(b) might "materially advance the ultimate termination of this litigation." App. D-2, E-5.

The Court of Appeals for the Eighth Circuit, which had earlier ruled that the propriety of the foreign government claims could not be challenged on mandamus (*see Pfizer Inc. v. Lord and The Republic of Vietnam*, 522 F.2d 612, 614-15 (8th Cir. 1975)), agreed to hear the interlocutory appeal. On May 19, 1976 a panel of that circuit affirmed the judgment of the District Court.

(fn. cont. from preceding page)

957 (2d Cir. 1970), *aff'd upon equal division of the court*, 404 U.S. 548 (1972), *acquittal on remand*, 367 F. Supp. 91 (S.D.N.Y. 1973). See also, e.g., *State of West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971); *Hartford Hospital v. Chas. Pfizer & Co.*, 52 F.R.D. 131 (S.D.N.Y. 1971); and *State of North Carolina v. Chas. Pfizer & Co.*, 384 F. Supp. 265 (E.D.N.C. 1974), *aff'd*, 537 F.2d 67 (4th Cir.), *cert. denied*, 97 S.Ct. 183 (1976). In addition to the claims of foreign countries for treble damages, a claim for single damages by the United States remains outstanding. Most of the other claims have been disposed of by settlement or adjudication.

3. The District Court did not rule on motions to dismiss the claims of the Federal Republic of Germany and Colombia, the only other foreign countries that have claims outstanding in this litigation. Claims by South Korea, Spain and Kuwait have been withdrawn. For a reported opinion in the Kuwait case, see *In re Antibiotic Antitrust Actions*, 333 F.Supp. 315 (S.D.N.Y. 1971).

The Decision of the Original Panel

The panel noted that this is a case of "first impression" (App. B-2), and stated that "whether a foreign government may sue under the Clayton Act turns on the interpretation of the statute and nothing more. Our task is to determine the intent of Congress in passing the Act." App. B-3. It observed that "[t]wo decisions of the United States Supreme Court offer guidance. . . ." App. B-4. In one, *United States v. Cooper Corp.*, 312 U.S. 600 (1941), the Court held that the United States was not a "person".⁴ In the other case, *Georgia v. Evans*, 316 U.S. 159 (1942), the Court held that a State of the United States *was* a "person" entitled to sue for treble damages. Comparing the two cases, the panel acknowledged that "*Cooper* does contain passages which on the surface lend support to appellants' argument" (App. B-5) but nonetheless found *Georgia v. Evans* controlling as to the right of a foreign country to sue. App. B-7.

One member of the panel, the Honorable Donald R. Ross, concurred "because I think the result is mandated by *Georgia v. Evans*," but added that, in his view,

Congress . . . gave no consideration nor did it have any legislative intent whatsoever, concerning the question of whether foreign governments are 'persons' under the Act. In my opinion it is time for Congress to re-examine this extremely important question and clarify it by legislation.

App. B-7—B-8.

The Decision En Banc

Petition for rehearing *en banc* was granted and after such rehearing before the eight judges of the circuit in regular

4. Thereafter, Congress gave the United States a right to sue for single damages, but withheld the treble-damage remedy. Act of July 7, 1955, ch. 283, § 1, 69 Stat. 282 (codified as 15 U.S.C. § 15a).

active service (including all three members of the original panel) six judges adhered to the decision of the original panel. Three of the six (Chief Judge Gibson, Judge Webster and Judge Ross himself) also joined in the original concurrence of Judge Ross. App. A-1.

Two judges (Bright and Henley, JJ.) dissented:

It seems anomalous to suggest that foreign sovereigns should enjoy the right to sue for treble damages when that right has not been granted to the United States. The *Cooper* Court stated, "Since, in common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it." [312 U.S.] at 604. Furthermore, the Court noted that "if the United States was intended to be included Congress would have so provided expressly." *Id.* at 607. We would apply this pronouncement here and exclude foreign governments as "persons" entitled to sue under the Clayton Act.

. . .

. . . States and municipalities of these United States are not analogous to foreign sovereigns. Certainly Congress would face different or additional policy questions in deciding whether foreign sovereigns should be authorized to sue a domestic corporation for treble damages.
App. A-2—A-3.

REASONS FOR GRANTING THE WRIT

Summary

The Court has previously granted certiorari to decide whether the United States and States of the Union were "persons" entitled to sue for treble damages. In both cases the petition was granted because of the importance of the question presented. See *United States v. Cooper Corp.*, 312 U.S. at 603; *Georgia v. Evans*, 316 U.S. at 161. The question now raised, whether foreign countries may sue, is the last of these related questions. It is of equal importance and has not been resolved by the Court's previous decisions.

The Eighth Circuit's decision here in issue establishes a novel and extremely important cause of action under the antitrust laws, in apparent conflict with *United States v. Cooper Corp.*, and despite the conclusion by five of the eight judges sitting *en banc* that Congress had no "legislative intent whatsoever" as to creation of a treble-damage right for foreign governments. App. B-8; A-2. Three of the five nonetheless felt compelled to concur in the majority's decision to establish such a right because, as they said, "the result is mandated by *Georgia v. Evans*." App. B-7. It is respectfully submitted that the concurring judges disregarded the essential principle of separation of powers as well as controlling precedent of this Court, for both *Georgia v. Evans* and *United States v. Cooper Corp.* confirm that the cause of action for treble damages may be extended to political entities only if such extension properly reflects the intent of Congress. 312 U.S. at 605; 316 U.S. at 161. Mechanical application of a highly distinguishable precedent did not fulfill the task of decision, which all members of the majority below agreed was "to determine the intent of Congress in passing the Act." App. B-3.

The Court of Appeals erred in failing to recognize that, while considerations of federalism impelled Congress to accord the treble-damage right to States of the Union, those considerations are not applicable to foreign countries. The States had surrendered to Congress their authority to regulate interstate and foreign commerce and Congress had assumed a corresponding obligation to regulate such commerce for their common benefit. Congress has assumed no such protective or suzerain role with respect to foreign governments. They continue to possess sovereign powers to regulate commerce in accord with their own economic philosophies.

Since the Court of Appeals declined to consider the applicable reasons of policy which may have moved Congress to withhold the treble-damage remedy from foreign governments, and since it concluded, in effect, that it must apply a precedent of this Court in a manner which does not reflect the intent of Congress, this Court should exercise its supervisory jurisdiction. It is for this Court to say whether its 1942 decision that the State of Georgia could maintain a treble-damage action does indeed compel the conclusion that by inadvertence, without legislative intent, Congress conferred on foreign countries a treble-damage right that it chose to withhold from the United States. See 15 U.S.C. § 15a (1970).

The question now presented should be resolved without delay because of its importance in the administration of the federal antitrust laws and because it affects the relationships between American business and all of the world's governments, which participate in international trade on a massive scale never imagined when Congress enacted the antitrust laws.

I.

The Decision of the Court of Appeals Raises an Important Question of Federal Law which Should be Settled by this Court Without Delay.

In both *United States v. Cooper Corp.* and *Georgia v. Evans* the petition for certiorari was granted because of the importance of the question presented. See 312 U.S. at 603; 316 U.S. at 161. The question now raised—the last of these related questions—is of equal importance.

The Eighth Circuit's grant of rehearing *en banc* is an indication of the "exceptional importance" of these cases. FED. R. APP. P. 35. Indeed, the concurring judges described the question as "extremely important." App. B-8. Although the Department of Justice has opposed our position on the merits in the lower courts, it, too, has acknowledged that these cases present "important economic and foreign-policy issues" and pose "an important question involving the interpretation and administration of the federal antitrust laws." Motion of the United States for Leave to Participate in Oral Argument as Amicus Curiae at the En Banc Rehearing, p. 2, No. 76-1064 (8th Cir. Sept. 3, 1976).

The question will not be altered or illuminated by trial. Both *United States v. Cooper Corp.* and *Georgia v. Evans* were decided after dismissal on the pleadings, without benefit of a trial record. Decision of the question, if in favor of petitioners, will substantially terminate the litigation of these cases and eliminate the need for lengthy trials.⁵ Recent practice of this Court accords with the spirit of the Interlocutory Appeals Act of 1958, 28 U.S.C. § 1292(b), and confirms that certiorari may properly be

5. In the related case in which the United States Government seeks single damages, a mistrial was declared on August 16, 1976 after some 21 months of intermittent trial. *United States v. Pfizer Inc.*, No. 4-71 Civ. 403 (D. Minn.).

granted to decide important questions whose resolution might eliminate the need for extended discovery and trial, particularly of antitrust claims. See *Abbott Laboratories v. Fortland Retail Druggists Ass'n*, 425 U.S. 1, 6 (1976); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 192-93 (1974); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 256-57 (1972).

Denial of certiorari in these cases would very likely result in the litigation of other antitrust claims by foreign governments, which would necessarily proceed in the lower courts for a number of years prior to entry of any final judgment. So long as the Eighth Circuit's decision remains unreviewed by this Court, American companies abroad will be uncertain what measures they may safely take to resist foreign confiscations, compulsory amendments to concession agreements, and other impositions which have often occurred in the past and may occur again at any time.

A recent case in the Second Circuit illustrates one aspect of the problem. *Long Island Lighting Co. v. Standard Oil Co. of Cal.*, 390 F. Supp. 1172 (S.D.N.Y.), *aff'd in part and rev'd in part*, 521 F.2d 1269 (2d Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976). After Libya's "Revolutionary Command Council" seized certain oil concessions from American grantees, the Americans declined to repurchase their own oil from the Libyan government, fearing that if they yielded to Libya, Saudi Arabia, where they held even more important oil properties, would carry out a similar confiscation. The Second Circuit described their conduct as "a group boycott aimed primarily at Libya and secondarily at Saudi Arabia" (521 F.2d at 1274), but held that plaintiff East Coast utilities, which suffered a resulting shortage of Libyan oil, had no right to complain of an antitrust violation since they were not in the "target area" of the boycott. If the Eighth Circuit's decision in the instant cases were allowed to stand, however, a foreign government might be free not only to seize the property of American

companies but to use American courts to punish any combined resistance. Indeed, if American companies were successful in resisting a takeover, they might find themselves liable to the foreign country for antitrust damages in excess of the value of their own threatened assets. In effect, the Eighth Circuit's decision could eliminate joint resistance or joint bargaining by American business as an instrument for the defense of our commercial interests.⁶

Still other harmful consequences appear likely. Some foreign countries which have already reaped vast profits through trade combinations such as OPEC would be only too happy to let American courts award them further chunks of the American economy as "damages." Multiple damage claims by such governments could transform the capital inflow which American exports have achieved in some fields, such as aircraft, computers and electronic equipment, into massive losses for American investors and our balance of payments, and might even result in transfers of ownership or control to foreign states. The possibility of such consequences would have been repugnant to Congress, which recognized the punitive nature of the treble-damage action⁷ and intended it as an ancillary weapon, not the sole method of enforcement. We do not suggest that violation of the antitrust laws be encouraged or ignored, but that the national interest will best be served if the enforcement of those laws is left to the federal government and to the "persons" Congress had in mind when it established the private cause of action.

6. In the past the Executive Department has sanctioned and probably encouraged joint bargaining by American oil companies with various Arab nations in order to resist threats of nationalization or demands for increased revenue from oil concessions. See *Hearings on Multinational Petroleum Companies and Foreign Policy Before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations*, 93d Cong., 2d Sess., pt. 9, at 46-49 (1974) (Statement of Thomas E. Kauper, Assistant Attorney General of the United States, Antitrust Div., Dep't of Justice).

7. See, e.g., 21 CONG. REC. 3146 (1890) (remarks of Senator Hoar).

II.

Congress Did Not Intend to Confer the Cause of Action for Treble Damages Upon Foreign Governments.

A. In 1890 and in 1914 It Was Clear Under Controlling Statute And Supreme Court Precedent That the Term "Person" Did Not Extend to Foreign Governments Without Express Definition.

In 1871 Congress enacted a general interpretive statute in which, as Mr. Justice Frankfurter stated, "Congress supplies its own dictionary."⁸ As enacted, the statute provided that in federal legislation "the word 'person' may extend and be applied to bodies politic and corporate" Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431. In 1872, however, the commissioners charged with statutory revision⁹ reported to Congress that the reference to "bodies politic" was "ambiguous" and "goes further than is convenient," since it might be deemed to include unincorporated government entities and thus "requires the draughtsman, in the majority of cases of employing the word 'person,' to take care that States, Territories, foreign governments, &c., appear to be excluded." Therefore the revisers recommended that Congress omit the reference to "bodies politic" so as to ensure that "person," when used in subsequent legislation, would not be extended to such governments without special definition. See Revisers' Note, I *Revision of the United States Statutes as Drafted by the Commissioners* 19 (1872). Congress adopted the recommendation. Act of June 22, 1874, 18 Stat., pt. 1, at 1, 1092 (Revised Statutes enacted into positive law). Thereafter the definition of "person" which appeared in Title I, Chapter I, Section 1 of the Revised Statutes, and with which the drafters of the Sher-

8. F. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 536 (1947).

9. Appointed pursuant to Act of June 27, 1866, ch. 140, 14 Stat. 74.

man Act were undoubtedly familiar, provided simply that "the word 'person' may apply and be extended to partnerships and corporations." Cf. 1 U.S.C. § 1 (present version). Contemporary annotations pointed out that the provision as drafted was intended to exclude "foreign governments." See I *Notes on the Revised Statutes of the United States, 1874-1889* at 1 (J. Gould & G. Tucker eds. 1889). In choosing similar language for section 8 of the Sherman Act (Act of July 2, 1890, ch. 647, § 8, 26 Stat. 210; 15 U.S.C. § 7), the authors of that law manifested a similar purpose to exclude foreign governments. The authors of the relevant sections of the Clayton Act adopted the same language, taken from the Sherman Act, and manifested the same purpose.¹⁰

A decision of this Court gave the authors of the Sherman Act further reason to believe that in using the word "person" they were not conferring a cause of action upon foreign governments. In *United States v. Fox*, 94 U.S. 315 (1876), the Court unanimously approved, as a general rule of construction, the same rule which Congress had adopted for the interpretation of federal statutes in 1874:

The term 'person' as . . . used [in the New York statute governing the devise of real property] applies to natural persons, and also to artificial persons,—bodies politic, deriving their existence and powers from legislation,—but cannot be so extended as to include within its meaning the Federal government. *It would require an express definition to that effect to give it a sense thus extended.*

94 U.S. at 321 [emphasis added].

10. Section 8 of the Sherman Act is substantially identical to the relevant portion of section 1 of the Clayton Act, here in issue. Compare 15 U.S.C. § 7 (Sherman Act § 8) with 15 U.S.C. § 12 (Clayton Act § 1). Also substantially identical are section 4 of the Clayton Act, here in issue, and section 7 of the Sherman Act. 15 U.S.C. § 15 was regarded as the codification of both sections. See *Georgia v. Evans*, 316 U.S. at 160; W. Thornton, *COMBINATIONS IN RESTRAINT OF TRADE* 906 (1928 ed.). In 1955 Sherman Act, section 7 was repealed as duplicative of Clayton Act, section 4. Act of July 7, 1955, ch. 283, § 3, 69 Stat. 283. See S. REP. No. 619, 84th Cong., 2d Sess. 2 (1955).

In other words, so far as legislation was concerned, "person," unless extended by special definition, did not include independent powers beyond the authority of the enacting state. See *In re Fox*, 52 N.Y. 530, 535 (1873), *aff'd sub nom. United States v. Fox*, 94 U.S. 315 (1876).¹¹

The authors of the Sherman Act had a wide acquaintance with the precedents of this Court, scores of which were cited in the antitrust debates of 1889-90.¹² We are told that, in preparing its definitive draft of the law, the Senate Judiciary Committee sought to use "terms which had a perfectly settled meaning in jurisprudence."¹³ In view of the controlling statute and precedent of this Court, they were entitled to conclude that "person" was such a term and that it did not include foreign sovereigns unless extended by special definition. They chose to extend the term to include all corporations and associations, regardless of their place of organization, but not foreign sovereigns.¹⁴ Their choice merits continued respect today.¹⁵

11. It may also have been the *Fox* case which prompted the drafters of the Sherman Act, section 8 to particularize that "person" included all corporations and associations whether organized under the laws of "the United States, . . . the Territories, . . . any State, or . . . any foreign country," since this Court had observed in that case that a reference to "corporations" without more might include only those corporations organized under the laws of the enacting state. See 94 U.S. at 321.

12. See *BILLS AND DEBATES IN CONGRESS RELATING TO TRUSTS*, S. Doc. No. 147, 57th Cong., 2d Sess. ix-xi (1903).

13. F. E. Leupp, *The Father of the Anti-Trust Law*, *THE OUTLOOK*, September 30, 1911, at 273.

14. Under the usual rule of construction, "expressio unius est exclusio alterius," section 8's careful enumeration of the entities, corporations and associations, which are to be deemed persons implies that other entities are excluded. *United States v. Cooper Corp.*, 312 U.S. at 407; *United States v. United Mine Workers*, 330 U.S. 258, 275 (1947) ("The absence of any comparable provision extending the term [person] to sovereign governments implies that Congress did not desire the term to extend to them").

15. Further evidence of this choice is found in the fact that when Senator Sherman and the Senate Finance Committee proposed at one stage to base the enactment of 1890 upon the federal diversity juris-

(fn. cont. on following page)

B. Considerations of Federalism Which Impelled This Court to Extend the Treble Damage Remedy to States of the Union Are Not Applicable to Foreign Countries.

When this Court considered *Georgia v. Evans* it had long been established that cities could sue for treble damages, since they were not sovereigns but "municipal corporation[s]" formed under the laws of the several States. See *City of Atlanta v. Chattanooga Foundry & Pipe Co.*, 101 Fed. 900, 901 (E.D. Tenn. 1900), *rev'd on other grounds*, 127 Fed. 23 (6th Cir. 1903), *aff'd*, 203 U.S. 390 (1906). The State of Georgia argued that "if the word 'person' as used in the statute excludes the sovereign, the State may yet maintain an action," because it "has effectively divested itself of its sovereignty with reference to . . . interstate commerce . . . and is relegated to the status of a private individual." Brief for Appellant at 37, *Georgia v. Evans*, 316 U.S. 159 (1942).

Georgia's argument recalled that made by Senator Sherman himself in 1890, when he urged adoption of a federal antitrust law on the ground that state laws were ineffective to control inter-state conspiracies. He described New York's attack upon the sugar trust and noted that although a New York court had been able to dissolve one New York corporation, "the combination was between that company and sixteen others In the courts of the United States all of

(fn. cont. from preceding page)

dition, they pointedly omitted that portion of the diversity jurisdiction which allows suit by or against foreign states. The Act was to apply only to "citizens or corporations" of different States, of the United States and foreign countries, or of foreign countries. See, e.g., 21 CONG. REC. 2455, 2464 (1890). After the language containing the diversity requirement was eliminated, the bill referred to all "citizens or corporations," and Senator Sherman obtained the Senate's consent to substitute the word "persons" for "citizens," describing the change as a mere "verbal amendment." *Id.* 2639. Thus, as approved by the Senate prior to final referral to the Judiciary Committee, the bill forbade combinations between "persons or corporations." "Persons", as the verbal equivalent of citizens, meant individuals, regardless of their citizenship.

them might have been parties, but as a matter of course, the supreme court of New York could not extend its jurisdiction beyond the limits of its own territory." 21 Cong. REC. 2459 (1890).

In deciding *Georgia v. Evans*, this Court responded to the problem created by the States' surrender to Congress of their power to regulate interstate commerce and concluded that, in view of the "legislative environment," Congress intended to confer the cause of action for treble damages upon the States. 316 U.S. at 161. It appears that the purpose of the 1874 amendment to the statutory definition of "person" was not brought to the Court's attention.

The Court recognized that Congress wished to exercise the commerce power in the interest of the States, and observed that "[i]f the State is not a 'person' within § 8, the Sherman Law leaves it without any redress for injuries resulting from practices outlawed by that Act" 316 U.S. at 162-63. The Court did not hold that a state or "state-like" entity was necessarily a "person," but rather, quoting *United States v. Cooper Corp.*, that there was "no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent" 316 U.S. at 161. All are "factors" to be weighed. *Id.*

In the present cases the Court of Appeals declined to weigh these factors and instead assigned to the word "person" a broad, perfunctory meaning. In so doing it disregarded controlling precedent of this Court which holds that "person" must be limited to reflect the intent of Congress. *City of Kenosha v. Bruno*, 412 U.S. 507, 512-13 (1973); *Monroe v. Pape*, 365 U.S. 167, 191 & n.50 (1961); *Georgia v. Evans*, 316 U.S. 159, 161 (1942); *United States v. Cooper Corp.*, 312 U.S. 600, 604-05 (1941); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818).

The Court of Appeals stated that if foreign governments are not "persons," then the antitrust laws afford them no

redress (App. B-6—B-7), and apparently found this truism dispositive. It erred in assuming that Congress intended to protect foreign governments in the same manner that it protects the States. It overlooked the fact that, unlike the States, foreign countries retain plenary powers to protect themselves.¹⁶

There is no need to ascribe to Congress a "discriminatory" purpose in order to conclude that it accorded treble-damage rights to the States but not to foreign countries. It is part of Congress' task to protect the States. The comity it extends to foreign countries entails a far different obligation.¹⁷

C. The Judicial Branch Should Not Extend Section 4 of the Clayton Act for the Benefit of Foreign Countries Without A Clear Expression of Congressional Intent.

Despite long experience with the Sherman and Clayton Acts, it appears that the cases against petitioners are the first to be reported in which foreign countries have asserted

16. In an appropriate case, foreign governments may employ the diplomatic channel to request that the Executive Branch commence an injunctive action under our antitrust laws. Unlike States (*see, e.g., City Bank Farmers Trust Co. v. Schnader*, 291 U.S. 24, 29 (1934)), foreign governments may also invoke the diversity jurisdiction of the federal district courts, and may sue there under the principles of their own law, if its application is not contrary to the policy of the forum. Or they may sue wrongdoers in their own courts. Of course, foreign countries may enact their own antitrust legislation as respondents India and the Philippines have done. *See* India Monopolies and Restrictive Trade Practices Act, 1969, 14 INDIA A.I.R. MANUAL 657 (1972); PHILIPPINES REV. PENAL CODE art. 186 (1972).

17. Congress recognized the difference only this year when it established a right of States to sue for antitrust violations as *parens patriae* on behalf of their citizens, but did not extend the right to foreign countries. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, tit. III (Sept. 30, 1976). *Cf. United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 208 (1968) (Congressional antitrust policy as expressed in Webb-Pomerene Act, 40 Stat. 517; 15 U.S.C. §§ 61-65 (1970)).

a right to treble damages. "[J]ust as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *Federal Trade Commission v. Bunte Bros.*, 312 U.S. 349, 352 (1941). *Accord, United States v. Cooper Corp.*, 312 U.S. 600, 614 (1941). See also *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357 (1953).

The general rule applied by this Court is that the Judicial Branch should leave to Congress the decision whether to provide particular damage remedies. *E.g., Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 264 (1972); *United States v. Gilman*, 347 U.S. 507, 511-13 (1954); *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 314-17 (1947). See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 206-11 (1976). The observation in *United States v. Cooper Corp.* that "it is not our function to engraft on a statute additions which we think the legislature logically might or should have made" (312 U.S. at 605) is particularly applicable to the present situation because of the conclusion by five of the eight judges who considered these cases in the Court of Appeals that Congress had no "legislative intent whatsoever" as to creation of a treble-damage right for foreign governments. App. A-2, B-8. The Judiciary should not create a cause of action that Congress did not intend.

The admonition as to judicial restraint is especially appropriate today when many of the world's foreign countries are arrayed in trade combinations which conflict with the philosophy of the antitrust laws, but which our government has been substantially powerless to prevent. If the decision is made to accord such countries the right here in issue, it should be made by Congress.

CONCLUSION

The question presented in these cases is not whether foreign countries are juristic persons which may sue or be sued in our courts. The question is whether they were "persons" within the purpose and contemplation of Congress, upon whom Congress conferred a statutory right to treble damages on enactment of the Sherman and Clayton Laws. The Court has previously granted certiorari to decide the same question with respect to the United States and States of the Union. *United States v. Cooper Corp.*, 312 U.S. 600 (1941); *Georgia v. Evans*, 316 U.S. 159 (1942). It is respectfully urged that the importance of the question now raised, the need to settle the question without delay, and the duty to ensure that the Judiciary interpret the anti-trust laws in accordance with the intent of Congress (see SUP. CT. R. 19 (1)(b)), all call for the grant of this petition for certiorari.

Respectfully submitted,

JULIAN O. VON KALINOWSKI
JOE A. WALTERS
JOHN H. MORRISON
*Attorneys for Petitioner
Pfizer Inc.*

MERRELL E. CLARK, JR.
*Attorney for Petitioner
Bristol-Myers Company*

ROBERTS B. OWEN
*Attorney for Petitioner
The Upjohn Company*

SAMUEL W. MURPHY, JR.
PETER DORSEY
WILLIAM J. T. BROWN
*Attorneys for Petitioner
American Cyanamid Company*

ALLEN F. MAULSBY
*Attorney for Petitioners
Squibb Corporation and
Olin Corporation*

GORDON C. BUSDICKER
*Attorney for Petitioners
Bristol-Myers Company,
The Upjohn Company,
Squibb Corporation, and
Olin Corporation*

December 1, 1976

APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 76-1064

PFIZER, INC., *et al.*,

Appellants,

v.

THE GOVERNMENT OF INDIA, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA.

SUBMITTED: AUGUST 17, 1976
FILED: SEPTEMBER 3, 1976

Before GIBSON, Chief Judge, LAY, HEANEY, BRIGHT, ROSS,
STEPHENSON, WEBSTER and HENLEY, Circuit Judges, *en banc*.

PER CURIAM.

The original panel opinion filed on May 19, 1976, is adopted by the court. Chief Judge Gibson and Judge Webster also join in Judge Ross' concurring opinion.

The judgment of the district court is ordered affirmed.

BRIGHT and HENLEY, Circuit Judges, dissenting:

This case presents the question of whether foreign sovereigns are "persons" entitled to sue for treble damages under

§4 of the Clayton Act (15 U.S.C. §15). As the majority opinion acknowledges, two Supreme Court decisions provide the only instances in which similar questions have been considered. In *United States v. Cooper Corp.*, 312 U.S. 600 (1941), the Court ruled that the United States was not a "person" entitled to sue for treble damages under the anti-trust laws. In *Georgia v. Evans*, 316 U.S. 159 (1942), the Court held that Congress did intend the states to be such "persons." We believe that *Cooper* is the proper guide for decision of the instant case.

It seems anomalous to suggest that foreign sovereigns should enjoy the right to sue for treble damages when that right has not been granted to the United States. The *Cooper* Court stated, "Since, in common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it." *Id.* at 604. Furthermore, the Court noted that "if the United States was intended to be included Congress would have so provided expressly." *Id.* at 607. We would apply this pronouncement here and exclude foreign governments as "persons" entitled to sue under the Clayton Act.

Congress made no express provision for foreign governments, nor is there any evidence that Congress considered granting a foreign government the right to sue for treble damages. Judge Ross in a separate concurrence (joined by Chief Judge Gibson and Judge Webster) appropriately observed that Congress "gave no consideration nor did it have any legislative intent whatsoever, concerning the question of whether foreign governments are 'persons' under the Act." [Slip op. at 8.] The *Cooper* Court stated:

[I]t is not our function to engraft on a statute additions which we think the legislature logically might or should have made. [312 U.S. 605.]

The judiciary ought not to add foreign governments to the "person" class without a clear Congressional intent to do so.

The majority opinion reasons that because *Georgia v. Evans*, *supra*, authorizes a state of the United States to bring treble damage suits as a "person" under the Clayton Act, that, therefore, foreign sovereigns must also be granted the right to sue. We do not agree with the logic of such conclusion.

The *Evans* Court reasoned that Congress intended that a State be deemed a person authorized to sue for treble damages for otherwise it would have no redress for antitrust violations; that no reason exists for believing that Congress wanted to deny a State this remedy, and, finally, that because it already had been held that municipalities, which are subdivisions of States, were entitled to such remedy, that such remedy should be afforded the State. The majority finds "the same reasoning [is] applicable to a foreign sovereign" [Slip op. at 7.], we cannot agree. States and municipalities of these United States are not analogous to foreign sovereigns. Certainly Congress would face different or additional policy questions in deciding whether foreign sovereigns should be authorized to sue a domestic corporation for treble damages.

The majority has concluded that in light of *Evans*, "Congress intended other bodies politic, such as a foreign government, to enjoy the same right." [Slip op. at 7.] If this conclusion rests upon Congressional intent, the analysis is tenuous at best. If this conclusion is bottomed upon reasoning that since *Evans* expanded the reach of the term "person," the definition of "person" should now be even further expanded, then the majority has adopted a questionable principle of statutory construction.

The arguments and briefs of the parties demonstrate that the issue of granting an antitrust remedy to foreign governments presents complex matters relating to international trade and foreign policy. We note that many foreign countries foster monopolistic practices as a matter of government policy. For example, Iran, one of the plain-

tiffs-appellees, belongs to the cartel of the Organization of Petroleum Exporting Countries (OPEC). Granting such sovereigns the right to sue American companies for treble damages will not diminish their own restraint of trade. Nevertheless, plaintiffs-appellees, and the United States, as *amicus curiae*, argue that granting foreign sovereigns the right to sue under the antitrust laws will assure effective enforcement of those laws. Furthermore, the United States declares that granting such a right will "assure optimum financial efficiency in the allocation of American dollars sent abroad." [Amicus br. at 5.] Whether these and other policy considerations will be best implemented by authorizing a foreign government to recover treble damages for antitrust violations is a determination which Congress should make.

The Supreme Court has cautioned restraint on the part of the judiciary in expanding the scope of the Clayton Act beyond statutory language without a clear expression of Congressional purpose. See, e.g., *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 202 (1974); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972). We would heed that caution and reverse the district court.

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Appendix B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 76-1064

PFIZER, INC., *et al.*,

Appellants,

v.

THE GOVERNMENT OF INDIA, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA.

SUBMITTED: MARCH 11, 1976

FILED: MAY 19, 1976

Before LAY, ROSS and STEPHENSON, Circuit Judges.

LAY, Circuit Judge.

This interlocutory appeal is brought under 28 U.S.C. § 1292(b) by six major pharmaceutical firms, defendants in the district court in antitrust treble damage suits brought by the governments of several foreign countries.¹ The sole question certified for appeal is whether the district court was correct in holding that foreign governments are

1. The appellant pharmaceutical firms are Pfizer, Inc., American Cyanamid Company, Bristol-Myers Company, Squibb Corporation, Olin Corporation and The Upjohn Company.

The governments involved in this appeal are the Government of India, the Imperial Government of Iran, the Republic of the

"persons" entitled to sue for treble damages under § 4 of the Clayton Act, 15 U.S.C. § 15. We affirm the judgment of the district court.

All parties agree this is a case of first impression.² Civil suits by foreign sovereigns have long been recognized in federal courts. See *The Sapphire*, 78 U.S. 164 (1870).³ The Constitution of the United States extends the jurisdiction of the federal courts "to all Cases . . . [and] Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const. Art. III, § 2.

Philippines and the Republic of Vietnam (the former government of South Vietnam). In a prior opinion, this court refused to pass upon the continued viability of suit by the Republic of Vietnam. This question should be determined by the district court on remand. See *Pfizer, Inc. v. Lord*, 522 F.2d 612, 613 n. 3 (8th Cir. 1975).

We are informed that the governments of West Germany, Spain, Columbia [sic.] and South Korea have filed similar suits. The latter three suits were filed in the District of Columbia.

2. This issue was presented to this court once before by the same parties. At that time, the district court had not certified the question for interlocutory appeal under 28 U.S.C. § 1292(b). We held under those circumstances that an appeal was premature and that the order of the district court was not subject to review on a petition for a writ of mandamus. *Pfizer, Inc. v. Lord*, 522 F.2d 612 (8th Cir. 1975).

On remand, the district court granted § 1292(b) certification on whether foreign governments are "persons" within the meaning of § 4 of the Clayton Act, 15 U.S.C. § 15.

3. In *The Sapphire*, Mr. Justice Bradley wrote for the Court:

A foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here, may prosecute it in our courts. To deny him this privilege would manifest a want of comity and friendly feeling. Such a suit was sustained in behalf of the King of Spain in the third circuit by Justice Washington and Judge Peters in 1810. . . . Our own government has largely availed itself of the like privilege to bring suits in the English courts in cases growing out of our late civil war. Twelve or more of such suits are enumerated in the brief of the appellees, brought within the last five years in the English law, chancery, and admiralty courts. There are numerous cases in the English reports in which suits of foreign sovereigns have been sustained, though it is held that a sovereign cannot be forced into court by suit. 78 U.S. at 167-68.

It is agreed, however, that whether a foreign government may sue under the Clayton Act turns on the interpretation of the statute and nothing more. Our task is to determine the intent of Congress in passing the Act.⁴

Section 4 of the Clayton Act provides:

Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. 15 U.S.C. § 15.

Section 1 of the Act provides the following definition:

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country. 15 U.S.C. § 12.

The Supreme Court has stated, with reference to the anti-trust laws,

Whether the word "person" or "corporation" includes a State or the United States depends on its legisla-

4. All parties, and the United States (who appears as *amicus curiae* to urge that foreign sovereigns are entitled to sue) raise many public policy arguments concerning the potential effects on foreign trade, foreign relations, and the economy of a ruling either way. It is urged by appellees that dire consequences will flow from a determination that a foreign government is not entitled to sue for treble damages under United States antitrust laws. These are legislative arguments, and as such are not germane to the proper exercise of judicial power, except as they shed light on the purpose and intent of Congress in passing the legislation before us.

tive environment. . . . The *Cooper* case recognized that "there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law." 312 U.S. at 604-05.

Georgia v. Evans, 316 U.S. 159, 161 (1942) (emphasis added).

Two decisions of the United States Supreme Court offer guidance, but beyond these we find little relevant help in construing the statute. In *United States v. Cooper Corp.*, 312 U.S. 600 (1941), the Court decided that the United States government was not within the definition of "person" under the antitrust laws. One year later, however, in *Georgia v. Evans*, 316 U.S. 159 (1942), the Court held that Congress intended a state of the United States to be a "person" entitled to sue for treble damages.⁵

The appellant pharmaceutical firms rely on *Cooper* in urging that foreign governments are not entitled to sue. In *Cooper*, the Supreme Court found that Congress' provision of certain antitrust sanctions and remedies available only to the United States indicated an intent to exclude the United States government from the class of persons entitled to sue for treble damages. The Court pointed out in *Cooper* that only the United States could institute criminal prosecutions, request injunctions to restrain violations, and

5. Both *Cooper* and *Evans* dealt with former § 7 of the Sherman Act, which was repealed in 1955. That section provided:

Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

seize goods owned under contracts which violated the anti-trust laws.⁶

Cooper does contain passages which on the surface lend support to appellants' argument. The Court observed:

Since, in common usage, the term "person" does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it.
312 U.S. at 604.

The Court further stated:

The more natural inference, we think, is that the meaning of the word was in both uses limited to what are usually known as natural and artificial persons, that is, individuals and corporations.
Id. at 606.

Finally, the Court concluded:

The very fact, however, that this sweeping inclusion of various entities was thought important to preclude any narrow interpretation emphasizes the fact that if the United States was intended to be included Congress would have so provided expressly.
Id. at 607.

However, these observations must be read in light of the subsequent decision of *Georgia v. Evans*, *supra*, which recognized that the word "person", as used in the antitrust

6. In *Cooper*, the Court listed the following provisions:

Sections 1, 2, and 3 impose criminal sanctions for violations of the acts denounced in those sections respectively. Section 4 gives jurisdiction to the federal courts of proceedings by the Government to restrain violations of the Act and imposes upon United States Attorneys the duty to institute equity proceedings to that end. Section 5 regulates service in such suits. Section 6 authorizes seizure, in the course of interstate transportation, of goods owned under any contract or pursuant to any conspiracy made illegal by the statute.

312 U.S. at 607.

In 1955, Congress amended the Clayton Act to provide the United States government the right to sue for actual damages. See 15 U.S.C. § 15(a).

laws, did include the governments of domestic states. In *Evans*, Mr. Justice Frankfurter pointed out that *Cooper* held only that, due to the alternative antitrust weapons granted to the United States government, that government was not entitled to sue for treble damages as well. However, he emphasized that *Cooper* did not hold "that the word 'person' abstractly considered, could not include a governmental body." 316 U.S. at 161. Thus, in *Evans*, the Court distinguished *Cooper* by focusing on the distinctions between the array of remedies and sanctions given to the United States government and the single remedy of a treble damage suit provided to others who might be injured due to antitrust violations.

In *Evans* the Court said:

The considerations which led to this construction [in *Cooper*] are entirely lacking here. The State of Georgia, unlike the United States, cannot prosecute violations of the Sherman Law. . . . If the State is not a "person" within § 8, the Sherman Law leaves it without any redress for injuries resulting from practices outlawed by that Act.

The question now before us, therefore, is whether no remedy whatever is open to a State when it is the immediate victim of a violation of the Sherman Law. We can perceive no reason for believing that Congress wanted to deprive a State, as purchaser of commodities shipped in interstate commerce, of the civil remedy of treble damages which is available to other purchasers who suffer through violation of the Act. . . . Reason balks against implying denial of such a remedy to a State which purchases materials for use in building public highways. Nothing in the Act, its history, or its policy, could justify so restrictive a construction of the word "person" in § 7 as to exclude a State. Such a construction would deny all redress to a State, when mulcted by a violator of the Sherman Law, merely because it is a State.
316 U.S. at 162-63.

We find the same reasoning applicable to a foreign sovereign who claims injury due to antitrust violations and seeks to recover treble damages under the Clayton Act. When Congress enacted the antitrust laws, it expressly recognized that illegal contracts, conspiracies and monopolies by domestic firms may affect commerce with other nations.⁷ In view of the holding in *Evans* that Congress intended domestic state governments to have standing to sue for treble damages under the antitrust laws, we conclude that Congress intended other bodies politic, such as a foreign government, to enjoy the same right.⁸ There is certainly no indication of a contrary intent in the legislative history. In contrast to *Cooper*, no other provisions of the Act support the contention that Congress intended to exclude foreign nations. We find that the district court correctly held that foreign nations are "persons" under § 4 of the Act entitled to sue for treble damages.

The judgment is affirmed.

Ross, Circuit Judge, Concurring.

I concur in the opinion of Judge Lay because I think the result is mandated by *Georgia v. Evans, supra*. I believe, however, that Congress, in passing § 4 of the Clayton Act,

7. Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . with foreign nations." Section 2 of the Act, 15 U.S.C. § 2, refers to the same commerce "with foreign nations" in prohibiting monopolization. The definition of "commerce" in § 1 of the Clayton Act, 15 U.S.C. § 12, refers three times to commerce "with foreign nations."

8. More than one hundred years ago, the Supreme Court of the United States recognized:

Every sovereign State is of necessity a body politic, or artificial person, and as such capable of making contracts and holding property. . . . It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection. *Cotton v. United States*, 52 U.S. 228, 230-31 (1850).

B-8

15 U.S.C. § 15, gave no consideration nor did it have any legislative intent whatsoever, concerning the question of whether foreign governments are "persons" under the Act. In my opinion it is time for Congress to re-examine this extremely important question and clarify it by legislation.

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Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

C-1

Appendix C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA—FOURTH DIVISION

4-71 Civil 435

IN RE COORDINATED PRETRIAL PROCEEDINGS IN
ANTIBIOTIC ANTITRUST ACTIONS

4-72 Civil 312

THE REPUBLIC OF THE PHILIPPINES BY AND THROUGH THE
CENTRAL BANK OF THE PHILIPPINES, *Plaintiff,*

vs.

PFIZER, INC.; AMERICAN CYANAMID COMPANY; BRISTOL-MYERS
COMPANY; SQUIBB, INC.; E. R. SQUIBB AND SONS, INC.;
OLIN CORP.; AND THE UPJOHN COMPANY, *Defendants.*

MISCELLANEOUS ORDER No. 74-31

MEMORANDUM OPINION AND ORDER

The complaint in this action was filed in the District of Columbia on behalf of the Republic of the Philippines by and through the Central Bank of the Philippines. Shortly thereafter the Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. § 1407, transferred the action to this district for inclusion in the coordinated or consolidated pretrial proceedings in this litigation. Plaintiff alleges that defendants have violated the United States antitrust laws and seek treble damages under Section 4 of the Clayton Act, 15 U.S.C. § 15. Defendants plead as affirmative

defenses that the Republic of the Philippines lacks standing to sue under Section 4 of the Clayton Act and that, in any event, the Central Bank of the Philippines lacks capacity and authority to maintain this action on behalf of that foreign sovereign.

Pursuant to Rule 12(d) of the Federal Rules of Civil Procedure, plaintiff moved for an early determination of these issues and an order striking defendants' affirmative defenses.¹ On the basis of the briefs filed and the arguments heard, the Court finds (1) that the Republic of the Philippines, a foreign nation, is a "person" within the meaning of the federal antitrust laws and has standing to maintain an action for treble the damages suffered as a result of alleged violations of those laws; and (2) that the act of state doctrine precludes inquiry into the capacity and authority of the Central Bank of the Philippines to maintain this action on behalf of the Republic of the Philippines.

I. STANDING OF THE REPUBLIC OF THE PHILIPPINES

Earlier in these coordinated or consolidated pretrial proceedings, defendants moved to dismiss a similar private antitrust action brought by Kuwait, a foreign sovereign government, seeking treble damages under Section 4 of the Clayton Act. Defendants argued that Kuwait, as a foreign sovereign government, lacked standing to sue for treble damages under the federal antitrust laws. Following extensive briefing and argument, the Court held that a foreign nation is a "person" within the meaning of the United States antitrust laws and, therefore, is not precluded from maintaining a treble damage action for damages resulting

1. Specifically, the affirmative defenses designated in the answers as "First," "Second," "Third," and "Sixth" Defenses by Pfizer; "C" and "E" by American Cyanamid; Paragraphs "83" and "84" by Bristol-Myers; and "Third" and "Fourth" Defenses by Squibb, Inc., E. R. Squibb and Sons, Inc. and Olin Corporation. This Opinion and Order also applies to the extent that these issues are raised in general terms or as part of other enumerated defenses.

from alleged violations of those laws.² *In re Antibiotic Antitrust Actions*, 333 F. Supp. 315 (S.D.N.Y. 1971) (Miles W. Lord, J., sitting by designation).

Defendants raise the same issue as a defense to this action. They contend that, absent special legislative mandate, foreign governments are not "persons" within the purview of the Clayton Act and that, therefore, the Republic of the Philippines lacks standing to sue under Section 4 of the Act. Inasmuch as defendants advance essentially the same arguments as those asserted in the *State of Kuwait* action, the Court finds that its holding and the *ratio decidendi* in that action apply with equal force and effect to the *Republic of the Philippines* action.

II. THE CAPACITY OF THE CENTRAL BANK OF THE PHILIPPINES TO MAINTAIN THIS ACTION ON BEHALF OF THE REPUBLIC OF THE PHILIPPINES

Plaintiff urges that two letters addressed to the Court from His Excellency Eduardo Z. Romualdez, the Ambassador of the Philippines to the United States, support its contention that the act of state doctrine precludes defendants from challenging the capacity and authority of the Central Bank to maintain this action on behalf of the Republic of the Philippines.³ Defendants argue that the

2. The Court also found its holding to "apply with equal force and effect" to the private treble damage antitrust action brought by the Republic of Viet Nam. *In re Antibiotic Antitrust Actions*, *infra* at 315, n. 1. The Court certified for immediate appeal its Order denying defendants' motion to dismiss, 28 U.S.C. § 1292(b), and defendants timely filed a petition for permission to appeal with the Court of Appeals for the Second Circuit. Prior to a determination by the appellate court, the parties voluntarily dismissed the appeal.

3. The pertinent language from each letter is as follows:

This is to make of record that the above captioned action on behalf of the Republic of the Philippines represents the official action of the Philippine Government pursuant to actions taken by the Secretary of Justice of the Philippines and the Central

act of state doctrine is not applicable and that under Philippine law the Central Bank lacks the legal capacity to assert a claim on behalf of the Philippines sovereign. Defendants further argue that, in any event, before the Court can determine whether the act of state doctrine does apply defendants should be permitted to inquire into the facts surrounding the alleged "act of state."

The following language in *Underhill v. Hernandez*, 168 U.S. 25 (1897), is generally recognized as the origin of what has come to be known as the act of state doctrine:⁴

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves. *Id.* at 252.

The Supreme Court further developed the doctrine in *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303, 304 (1918); *Ricaud v. American Metal Co.*, 246 U.S. 304, 309 (1918); and, more thoroughly, in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416-30 (1964). The most recent Supreme Court pronouncements concerning the act of state

Bank of the Philippines. (Ambassador Romualdez's letter of July 14, 1972.)

I have been instructed by my Government to inform you that the above captioned action on behalf of the Republic of the Philippines was authorized and approved and represents the official action of the Philippine Government. (Ambassador Romualdez's letter of September 25, 1972.)

4. Earlier intimations of the concept can be found in three Supreme Court decisions relating to the seizure of vessels. *Hudson v. Guestier*, 8 U.S. (4 Cranch) 293 (1808); the *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812); and *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 336 (1822).

doctrine appear in *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972):

The doctrine precludes any review whatsoever of the acts of the government of one sovereign State done within its own territory by the courts of another sovereign State. *Id.* at 763.

...

The act of state doctrine . . . has its roots, not in the Constitution, but in the notion of comity between independent sovereigns. . . . The line of cases from this Court establishing the act of state doctrine justifies its existence primarily on the basis that juridical review of acts of state or a foreign power could embarrass the conduct of foreign relations by the political branches of the government. *Id.* at 765.

Defendants suggest that the act of state doctrine is not applicable to the facts of this case because a foreign sovereign, as a party-plaintiff, cannot invoke the doctrine and because that doctrine is limited to foreign acts of expropriation. It is clear from *Sabbatino* that a foreign government plaintiff in our courts is not precluded from invoking the doctrine. *Banco Nacional de Cuba v. Sabbatino*, *supra* at 437. And the Court finds little persuasive support in the cases and literature commenting on the doctrine for defendants' suggestion that the doctrine is limited to foreign acts of expropriation. *See, e.g., Pasos v. Pan American Airways*, 229 F.2d 271, 272, 273 (2d Cir. 1956); *United States ex rel. Steinworth v. Watkins*, 159 F.2d 50, 51 (2d Cir. 1947); *Banco de Espana v. Federal Reserve Bank*, 114 F.2d 438 (2d Cir. 1940); Mann, *The Legal Consequences of Sabbatino*, 51 VA. L. REV. 604, 623 (1965).

Defendants also contend that there is no statutory or judicial authority under applicable Philippine law to support the institution of this action by the Central Bank of the Philippines on behalf of the Republic of the Philippines. But an examination by our Courts of the acts of a recognized foreign sovereign within its own borders, in order to

determine whether or not those acts were legal under the laws of the foreign state, is the very practice that the act of state doctrine is intended to prevent. Not only would inquiry into the validity of an act of state under the law of that state "be exceedingly difficult but, if wrongly made, would be likely to be highly offensive to the state in question." *Banco Nacional de Cuba v. Sabbatino*, *supra* at 415, n. 17. Our Courts have consistently refused to conduct such an inquiry.⁵ Whether the foreign state's act is partially or wholly, technically or fundamentally, illegal under the state's local law is of no moment. The sole concern is whether the purported act of state is the act of a recognized foreign sovereign; if so, no matter how grossly the sovereign has transgressed its own laws,⁶ the details of such action or the merit of the result cannot be questioned but must be accepted by our Courts. *Ricaud v. American Metal Co.*, *supra* at 309.

Defendants argue as a last resort that, in any event, the act of state doctrine does not preclude inquiry into whether an "act of state" actually occurred. They rely on *Companie Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 75, 76 (1938), to support their contention that the Court does not have to accept Ambassador Romualdez's assertions as conclusive proof of the fact that the Central Bank was officially authorized to bring this action on behalf of the Republic of the Philippines and that inquiry into the facts surrounding this alleged "act of state" is permissible.⁷

5. See, e.g., *Bernstein v. Van Heurghen Freres Societe Anonyme*, 163 F.2d 246, 249 (2d Cir. 1947); *Banco de Espana v. Federal Reserve Bank*, *supra* at 443, 444; *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 102, 110 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972); *Carl Zeiss Stiftung v. F.E.B. Carl Zeiss, Jena*, 293 F. Supp. 892, 913, 914 (S.D.N.Y. 1968), *aff'd*, 433 F.2d 686 (2d Cir. 1970), *cert. denied* 403 U.S. 905 (1971).

6. *Banco de Espana v. Federal Reserve Bank*, *supra* at 444.

7. Defendants also assert that such inquiry should be permitted because it would pose no threat to the foreign relations between the United States and the Philippines. But the judicial branch of our

This argument is, in essence, another attack on the applicability of the doctrine to the facts of this case. The facts of *The Navemar* case are clearly distinguishable from those raised in this action and the Supreme Court's decision cannot be fairly viewed as persuasive authority in support of defendants' argument. An act of state has been described as "any governmental act in which the sovereign's interest qua sovereign is involved."⁸ And, the Court finds the following language in *Banco de Espana v. Federal Reserve Bank*, *supra* at 443, persuasive and controlling as to the facts presented here:⁹

[T]he governmental acts of a foreign country done within its own borders are not subject to examination in our courts. It would seem to follow that the statement that such acts had taken place, made to our courts officially on behalf of the friendly foreign government by its accredited representative, must be accepted as proof of that fact.

Therefore, the Ambassador's statement that the action brought by the Central Bank of the Philippines on behalf of the Republic of the Philippines was "authorized and approved and represents the official action of the Philippine Government" offers convincing evidence of a governmental act of the Philippine government performed in the Philippines and is conclusive upon the Court. The act of state doctrine precludes inquiry, either directly or collaterally, into the validity of or the circumstances surrounding the act of state.

government is ill-equipped to undertake the task of ascertaining what impact, if any, such inquiry will have at this time, or at some future date, on the United States' foreign relations with the Philippines and the act of state doctrine relieves the Courts of the burden of attempting to make such determinations.

8. *Banco Nacional de Cuba v. Sabbatino*, *supra* at 445, n. 3 (dissenting opinion, White, J.)

9. See also, *Ricaud v. American Metal Co.*, *supra* at 309.

IT IS THEREFORE ORDERED That defendants' affirmative defenses to the above-captioned action relating to (1) the standing of the Republic of the Philippines to sue for treble damages under the antitrust laws of the United States, and (2) the capacity and authority of the Central Bank of the Philippines to maintain this action on behalf of the Republic of the Philippines be, and the same hereby are, stricken from the pleadings.

Dated: January 16, 1974

/s/ MILES W. LORD

Miles W. Lord
United States District Judge

Appendix D

UNITED STATES DISTRICT COURT DISTRICT OF MINNESOTA—FOURTH DIVISION

4-71 Civ. 435 and Civ. 4-74 496

IN RE COORDINATED PRETRIAL PROCEEDINGS IN
ANTIBIOTIC ANTITRUST ACTIONS

THE GOVERNMENT OF INDIA,

Plaintiff,

— against —

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS
COMPANY, OLIN CORPORATION, THE UPJOHN COMPANY, SQUIBB,
INC. and E. R. SQUIBB & SONS, INC.,
Defendants.

MISCELLANEOUS ORDER No. 75-48

Plaintiff, the Government of India, filed this action in this Court on October 11, 1974. Defendants moved on October 17, 1974, pursuant to Rule 12(b)(6), F.R.Civ.P., to dismiss this action for failure to state a claim upon which relief can be granted, on the ground that the Complaint fails to state a claim under Section 4 of the Clayton Act (15 U.S.C. § 15) because plaintiff, a foreign government, is not a "person" entitled to sue under that statute. This matter was discussed at a pretrial hearing on October 22, 1974.

Earlier in these consolidated pretrial proceedings, following extensive briefing and argument, this Court held that the State of Kuwait, a foreign sovereign nation, is a "person" within the meaning of the United States antitrust laws and, therefore, is not precluded from maintaining a treble damage action under Section 4 of the Clayton Act.

In re Antibiotic Antitrust Actions, 333 F.Supp. 315 (S.D. N.Y. 1971) (Miles W. Lord, Jr., sitting by designation).

Being fully advised in the premises, the Court finds that its holding and the *ratio decidendi* in the *State of Kuwait* action apply with equal force and effect to this action by the Government of India; therefore, the Court holds that plaintiff, The Government of India, a foreign sovereign nation, is a "person" within the meaning of the United States antitrust laws and thus is entitled to maintain this action under Section 4 of the Clayton Act.

Defendants, in their motion of October 17, 1974, requested this Court to certify its decision, if adverse to defendants, for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The Court concurs with the recent statement by the Court of Appeals that this issue of the standing of foreign governments is "a difficult question of statutory interpretation, a question apparently of first impression." *Pfizer Inc., et al. v. Hon. Miles W. Lord and Republic of Vietnam, et al.*, 522 F.2d 612, 615 (8th Cir. 1975). Moreover, the Court recognizes that this standing matter is a threshold issue which should be resolved before the parties become further involved in other pretrial proceedings and discovery.

Therefore, IT IS HEREBY ORDERED:

1. Defendants' motion to dismiss, filed October 17, 1974, is denied; and

2. This Court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this Order may materially advance the ultimate termination of this litigation.

Dated: December 27, 1975.

/s/ MILES W. LORD

Miles W. Lord
U. S. District Judge

Appendix E

UNITED STATES DISTRICT COURT DISTRICT OF MINNESOTA—FOURTH DIVISION

4-71 Civ. 435

IN RE COORDINATED PRETRIAL PROCEEDINGS IN
ANTIBIOTIC ANTITRUST ACTIONS

and

4-71 Civ. 402

THE REPUBLIC OF VIETNAM,

Plaintiff,

v.

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS
COMPANY, SQUIBB INC., E. R. SQUIBB & SONS, INC., OLIN
CORPORATION and THE UPJOHN COMPANY,
Defendants.

4-72 Civ. 312

THE REPUBLIC OF THE PHILIPPINES BY AND THROUGH THE
CENTRAL BANK OF THE PHILIPPINES,

Plaintiff,

v.

PFIZER, INC., *et al.*,

Defendants.

4-74 Civ. 65

THE IMPERIAL GOVERNMENT OF IRAN,

Plaintiff,

v.

PFIZER INC., *et al.*,

Defendants.

MISCELLANEOUS ORDER No. 75-49

Plaintiffs are three foreign sovereign governments* whose actions are here as part of the above-captioned coordinated pretrial proceedings in the antibiotic antitrust actions. In all three cases, defendants have asserted by way of affirmative defenses that the plaintiff foreign governments are not "persons" entitled to sue under Section 4 of the Clayton Act, 15 U.S.C. § 15. Additionally, in the *Vietnam* and *Philippines* actions, defendants timely moved to dismiss under Rule 12(b)(6), F.R.Civ.P., on that ground. This matter has been briefed and discussed at several pretrial hearings.

Earlier in these consolidated pretrial proceedings, following extensive briefing and argument, this Court held that the State of Kuwait, a foreign sovereign nation, is a "person" within the meaning of the United States antitrust laws and, therefore, is not precluded from maintaining a treble damage action under Section 4 of the Clayton Act. *In re Antibiotic Antitrust Actions*, 333 F.Supp. 315 (S.D. N.Y. 1971) (Miles W. Lord, Jr., sitting by designation).

The Court has not previously entered an order on the "person" question in either *Vietnam* or *Iran*; however, the Court did state in a footnote to its opinion in the *State of Kuwait* action that its holding there would "apply with equal force and effect" to the *Republic of Vietnam* action (333 F.Supp. at 315, n. 1). In the action brought by the Republic of the Philippines, this Court held on January 16, 1974, in Miscellaneous Order No. 74-31 that that foreign

*On September 11, 1975, defendants moved pursuant to Rule 12, F.R.Civ.P. to dismiss the action brought by The Republic of Vietnam (No. 4-71 Civ. 402) on the ground that the plaintiff as named and described in the Amended Complaint no longer exists in any form recognizable by this Court and has not been succeeded by any government, entity or person that has capacity to sue in this Court. That motion has been fully briefed and is pending decision by this Court. In entering this Order, the Court expresses no view on the merits of that motion to dismiss.

nation is a "person" within the meaning of the antitrust laws and has standing to bring this action.

On June 25, 1974, defendants requested this Court to enter orders on the "person" question in *Vietnam* and *Iran* and, if adverse to defendants, to certify those orders pursuant to 28 U.S.C. § 1292(b). In the same request, defendants asked this Court to amend its Miscellaneous Order No. 74-31 in the *Philippines* action by adding the language necessary to certify that opinion to the Court of Appeals. Following briefing and argument, the Court did not enter any order in *Vietnam* and *Iran*, and denied the request to amend Order No. 74-31. Miscellaneous Order No. 74-39, entered September 5, 1974.

Being fully advised in the premises, the Court finds that its holding and the *ratio decidendi* in the *State of Kuwait* action apply with equal force and effect to these actions by the Republic of Vietnam and the Imperial Government of Iran; therefore, the Court holds that plaintiffs, the Republic of Vietnam and the Imperial Government of Iran, foreign sovereign nations, are "persons" within the meaning of the United States antitrust laws and thus are entitled to maintain these actions under Section 4 of the Clayton Act. At the same time, the Court reaffirms its holding in Miscellaneous Order No. 74-31 that the Republic of the Philippines is similarly entitled as a "person" to bring its action.

By Miscellaneous Order No. 75-48 entered today, this Court has held that the Government of India is a "person" entitled to sue under Section 4 of the Clayton Act and has certified that decision pursuant to 28 U.S.C. § 1292(b).

The Court concurs with the recent statement by the Court of Appeals that this issue of the standing of foreign governments is "a difficult question of statutory interpretation, a question apparently of first impression." *Pfizer Inc., et al v. Hon. Miles W. Lord and Republic of Vietnam, et al*, 522 F.2d 612, 615 (8th Cir. 1975). Moreover, the

Court recognizes that this standing matter is a threshold issue which should be resolved before the parties become further involved in other pretrial proceedings and discovery. The Court is now of the opinion that the "person" question should receive appellate attention not only in *India* but also in the three earlier-filed actions—*Vietnam*, *Philippines* and *Iran*—in the interest of proceeding expeditiously with this litigation.*

With regard to appeals by permission under 28 U.S.C. §1292(b), Rule 5(a) of the Federal Rules of Appellate Procedure provides, *inter alia*: "An order may be amended to include the prescribed statement at any time, and permission to appeal may be sought within 10 days after entry of the order as amended." Counsel for the Republic of the Philippines, in a letter to this Court dated September 26, 1975, requested that the "person" question be certified in the *Vietnam*, *Philippines* and *Iran* actions if it were certified in *India*. Counsel for the Imperial Government of Iran concurred in that request in his letter to this Court dated October 2, 1975. The Court hereby grants that request and respectfully suggests that the Court of Appeals may wish to consider the further suggestion of those plaintiffs that any appeal from this Order be considered by the same panel which received briefs and heard argument on defendants' petition for writ of mandamus on the "person" question in *Pfizer Inc., et al v. Hon. Miles W. Lord and Republic of Vietnam, et al, supra* (opinion dated August 27, 1975).

* On November 29, 1974, the Federal Republic of Germany filed a similar action in this Court (Civil Action No. 4-74 614). On December 9, 1974, defendants filed a motion to dismiss that action on the ground, *inter alia*, that the Federal Republic of Germany is not a "person" entitled to sue under Section 4 of the Clayton Act. The parties have indicated that special considerations may apply to the *Germany* case and thus defendants' motion to dismiss is not yet ready for decision.

Therefore, IT IS HEREBY ORDERED:

1. Plaintiffs the Republic of Vietnam and the Imperial Government of Iran are "persons" within the meaning of Section 4 of the Clayton Act and thus are entitled to bring these actions; therefore, to the extent consistent with this Order, defendants' motion to dismiss *Vietnam* dated March 12, 1971, is denied and defendants' affirmative defenses in *Vietnam* and *Iran* are stricken;

2. Miscellaneous Order No. 74-31 dated January 16, 1974, is amended to include the following language:

This Court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation.

and

3. This Court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation.

Dated: December 27, 1975.

/s/ MILES W. LORD

Miles W. Lord
U.S. District Judge

F-1

JUDGMENT

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 76-1064, September Term, 1975

PFIZER, INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS
COMPANY, SQUIBB CORPORATION, E. R. SQUIBB & SONS INC.,
OLIN CORPORATION, AND THE UPJOHN COMPANY

Appellants

vs.

THE GOVERNMENT OF INDIA, THE REPUBLIC OF VIETNAM, THE
IMPERIAL GOVERNMENT OF IRAN, AND THE REPUBLIC OF THE
PHILIPPINES BY AND THROUGH THE CENTRAL BANK OF
THE PHILIPPINES,

Appellees

UNITED STATES OF AMERICA,

Amicus Curiae

APPEAL FROM the United States District Court for the
District of Minnesota.

THIS CAUSE came on to be heard on the record from the
United States District Court for the District of Minnesota
and was argued by counsel.

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ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed in accordance with the majority opinion of this Court.

September 3, 1976
Filed October 12, 1976

HARRY A. SIEBEN, *Clerk*
by MARGARET KRIESER
Deputy

A true copy.

ATTEST:

/s/ ROBERT C. TUCKER

Clerk, U.S. COURT OF APPEALS, 8TH CIRCUIT
October 7, 1976